United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1068

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1068

UNITED STATES OF AMERICA,

Respondents,

-against-

ROBERTO ORTEGA,

Appellant.

BRIEF FOR

ROBERTO ORTEGA

Respectfully submitted,

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CASES CITED

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PRELIMINARY STATEMENT

Appellant was indicted on three (3) separate counts, to wit: violation of Title 18 U.S.C. 2113(a) and 2; Title 18 U.S.C. 2113(d), (2) (bank robbery) and Title 18 U.S.C. 2113(c) (possession of proceeds of bank robbery) Inasmuch as appellant was acquitted of the bank robbery charges, this appeal will be limited to the issue of search and seizure and excessive sentence on his conviction of Title 18 U.S.C. 2113(c).

Appellant was sentenced to a term of ten (10) years for his conviction on that count for the possession of proceeds of bank robbery.

FACTS

Prior to selection of jury a hearing was held to suppress certain items seized from appellant at time of his arrest, to wit: certain U.S. Currency alleged to be proceeds of the bank robbery; a pistol and some bullets.

PAUL CAVANAGH was called. He is an F.B.I. agent assigned to Bank Robbery Squad.

On morning of October 23, 1975, he was sent to the scene of a bank robbery alleged to have occurred at the Chase Manhattan Bank, 55-55 58th Street, Maspeth, Queens. (Trial Record, page 16)

While there, he received a description of the perpetrators, to wit: black males, in their twenties (20's), approximately 5'8" or 5'9", about one hundred fifty (150) pounds. He also learned that a witness took down license plate number of a blue 1975 oldsmobile. This car was alleged to have been used in the robbery. (Trial Record, page 17)

He later received information that said auto was located in East Elmhurst, New York. He stationed himself at said location. Said location was determined to be home of appellant.

He then observed a black male, about 5'9", 150 lbs., leave the house and enter said auto. This was about

one and a half (1 1/2) hours after holdup. (Trial Record, page 21)

As the car pulled away, he gave pursuit and pulled auto over to the curb.

Appellant was taken from auto. A large bulge was observed in pants pocket. A New York City Police Officer reached in and pulled out a fistful of money, which had Chase Manhattan wrappers on it. Approximately two thousand sixty ($2,060.00) in currency was seized. (Trial Record, page 23)

Witness then entered auto and drove it around the corner and conducted a search. In the glove compartment a 357 Smith & Wesson pistol was located. (Trial Record, page 26) U. S. currency was found in both trousers and jacket. (Trial Record, page 25) In addition, a pouch containing some bullets were found in the jacket.

On cross-examination, the agent stated the description he had of suspect could be considered a general description. (Trial Record, page 33)

When he first observed appellant leaving his home, he did not know for a fact that he was involved in any crime. (Trial Record, page 34)

The motion to suppress was denied. (Trial Record, pages 41-42)

Appellant appeared for sentence on February 6, 1976. At that time, it was stated by counsel for appellant, that

after reading the probation report he noted that report contained results of interviews with F.B.I. agents, who suspected the appellant of some twelve (12) to twenty (20) other bank robberies, as well as what happened to victims of said robberies. (Sentence Minutes, page 2) At this point, the Court stated it would only consider the count on which appellant had been convicted.

Counsel stated further, that appellant had not been charged as convicted of crime of the said bank robberies and additionally, the probation report then included appellant went from suspect, in said robberies, to actual robbery, who was pistol whipping people, etc. No charge was ever brought against him. (Sentence Minutes, page 3)

At this point, the Court stated that the appellant's sneaker print placed him in said bank at time of robbery. (Note: Court is referring to trial testimony which indicated that sneaker print found in bank allegedly matched sneaker taken from appellant at time of his arrest.) The portion of sentencing minutes, as follows:

> "...; and the sneaker print puts him in that bank.
>
> MR. BRACKLEY: That's what I mean, your Honor is basing your sentence on the fact that he's part of the bank robbery.
>
> THE COURT: I can only base it on what happened. I can't do any more than what happened being the jury chose to find him guilty of possession of the money which had come

out of the robbery, but there is no question that that footprint puts that man in that bank, no question in the Court's mind as to that.

MR. BRACKLEY: That's why I say it's a difficult argument.

THE COURT: He was caught within an hour of when the crime happened an hour later and that footprint from that sneaker puts that defendant in that bank.

MR. BRACKLEY: We brought in the photograph which I believe showed it was a different sneaker. That was part of our case. It seems that's what he's being sentenced for, the bank robbery rather than the possession.

THE COURT: He's being sentenced on what the jury found him guilty of. The Court is bound by that and cannot do any more than what he was found guilty of. That is what the Court is bound by, but I mean everything here about this situation seems to show that this man had to be part of what happened. It seems to show that to the Court. The Court is bound by what the jury did.

POINT I

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Inasmuch as there was no search warrant issued herein, the question to be argued is whether or not the search herein was incident to lawful arrest based upon probable cause. Draper v. U.S., 1959, 79 S.Ct. 329, 358 U.S. 307, 3 L.Ed. 2d 327; Ker v. State of California, 1963,

83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed. 2d 726.

In the case at bar, it was clear that from the facts that officers did not know the appellant was involved in any crime at time they saw him enter the auto. It would appear that the arrest was not incidental to a lawful arrest, but the arrest was incidental to the search. An arrest may not be used as a pretext to a search for evidence. U.S. v. Lefkowitz, 1932 52 S.Ct. 420, 424, 285 U.S. 452 76 L.Ed. 877, 82 ALR 775; U.S. Re, 1948, 68 S.Ct. 222, 332 U.S. 481, 92 L.Ed. 210; U.S. v. Lennear, C.A. 9th 1972, 464 F.2d 355.

It is also a fact, that appellant was not armed at time of arrest. Since he obeyed motion to stop and made no effort to resist arrest or escape there appeared no reason to search him at time of original stop. Chimel v. California, 1969 89 S.Ct. 2034, 395 U.S. 752.

Upon all the facts and circumstances herein, it is felt, that the motion to suppress should have been granted.

POINT II

SENTENCE WAS EXCESSIVE.

In this case, it is felt, that a sentence of ten (10) years was excessive. It is apparent from Court's remarks during sentence that appellant was being treated as

an actual participant in the robbery itself. Inasmuch as appellant was acquitted of said crime of robbery, it is felt, this was incorrect. (U.S. ex rel Jackson v. Myers, C.A. 3d 374 F.2d 707; Baker v. U.S., C.A. 4th, 388 F.2d 931; U.S. v. Malcolm, C.A. 2d 1970, 432 F.2d 809.)

Appellant herein has had no prior felony convictions. He did, however, have a minor arrest record.

In addition, it is clear, that probation report had stated that appellant was a suspect by F.B.I., in many other robberies. This statement is not disputed. However, later in the report, conclusion is made that appellant actually did participate in said robberies. Since no charges were ever brought, it is felt, that this is unfair and erroneous and should not have been before sentencing judge or panel.

Although, it has been held that Appellate Courts have no power to review sentence, however, there have been cases which have held that in some cases are reviewable. U.S. v. Hetherington, C.A. 7th, 1960, 279 F.2d 792, U.S. v. LoDuca, C.A. 2d 1960, 274 F.2d 57.

It is respectfully requested that upon all the facts and circumstances of this particular case that this case be remanded to the District Court with a recommendation to re-consider sentence. U.S. v. Wiley, C.A.7th, 1960, 278 F.2d 500.

CONCLUSION

JUDGMENT OF CONVICTION SHOULD BE REVERSED AND INDICTMENT DISMISSED.

Respectfully submitted,

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